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From the Desk of
TIMOTHY A. BAUGHMAN
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September 14, 2010

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2009-19

Dear Mr. Davis and Justices of the Court:

I regret that I am unable to be present for the court's administrative hearing on September 15, 2010, concerning Administrative File No. 2009-19. Though I have filed comments with the court concerning that file, I wish to make a few brief concluding remarks on the matter given the other comments filed. Though I may appear to be marching alone when the universe considered is that of the comments made, in the universe of the practice in other jurisdictions in this country, it is our current rules that march to the beat of a different drummer.

First, with regard to motions for relief from judgment. I wish to emphasize that 1)having a one-year period after the direct appeal is over in which to file a motion for relief from judgment is consistent with the overwhelming practice in this country, and 2)a one-year time limit is in the defendant's interest, so as not to forfeit any federal constitutional claims he or she might be able to raise in a federal habeas corpus proceeding, which is time-barred one year after the state direct appeal is over unless that time period is tolled by the proper filing of a state post-conviction motion (here, a motion for relief from judgment). Concerns for "actual innocence" carry no more—nor any less—weight here than they might with a successive motion for relief from judgment under the current rule, where the filing is allowed based on newly discovered evidence (and also based on retroactive changes in the law). Those remain available under the proposal so long as brought within one year of the time the newly discovered evidence was discovered or could have been with reasonable diligence (or within one year of an arguably retroactive change in the law). This again is consistent with the rest of the country. Below is the federal rule, and the rules of three states, chosen almost at random:

Federal postconviction review:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–
(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255

Pennsylvania

(b) Time for filing petition.--
(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
(I) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

42 Pa.C.S.A. § 9545

Washington

1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
(3) For the purposes of this section, a judgment becomes final on the last of the following dates:
(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

West's RCWA 10.73.090

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
(5) The sentence imposed was in excess of the court's jurisdiction; or
(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

West's RCWA 10.73.100

Minnesota (gives 2 years)

Subd. 4. Time limit. (a) No petition for postconviction relief may be filed more than two years after the later of:
(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or
(2) an appellate court's disposition of petitioner's direct appeal.
(b) Notwithstanding paragraph (a), a court may hear a petition for postconviction relief if:
(1) the petitioner establishes that a physical disability or mental disease precluded a timely assertion of the claim;
(2) the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted;
(3) the petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case;

M.S.A. § 590.01

With regard to guilty pleas. The proposal gives more than 6 months to file an application from a guilty-plea conviction, and the court rules require the transcript to be prepared within 28 days of its order. This time period is derived from the fact that the time for the application begins to run after denial of a motion to withdraw plea, which can be made for up to 6 months after sentencing. It seems to me that it is in the interest of defendants seeking leave to have their applications filed sooner than one year after conviction, as commonly happens now. As I indicated previously, that a presentence motion to withdraw plea may have been filed does not preclude a post-sentencing motion from being filed, and it is not uncommon for an appellate attorney, armed with the transcript, to file such a motion on different grounds. And I would think it a systemic value to have as many of these resolved in the trial court as possible.

Moving away from guilty pleas and motions for relief from judgment, it is just remarkable that Michigan permits a late appeal (by way of application) from a final order or judgment for up to one year after the entry of the judgment, something allowed, it appears, no where else in the country, and also allows discretionary appeals (from non-final orders) for that same time period. Finality surely has *some* role in the justice system. As to the criminal justice system, the United States Supreme Court has said that "[F]inality is essential to the criminal law's retributive and deterrent functions," and has stressed that "Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the powerful and legitimate interest in punishing the guilty."

The proposals before the court bring Michigan into step with the rest of the nation, foster the valued goal of expeditious litigation and finality, and, leave in place the same safety nets (principally newly discovered evidence and retroactive changes in the law) that the rest of the country does also. I heartily recommend approval (and would recommend that any decisions on "excusable neglect" be made by the Court of Appeals rather than the trial court).

Very truly yours,

TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals